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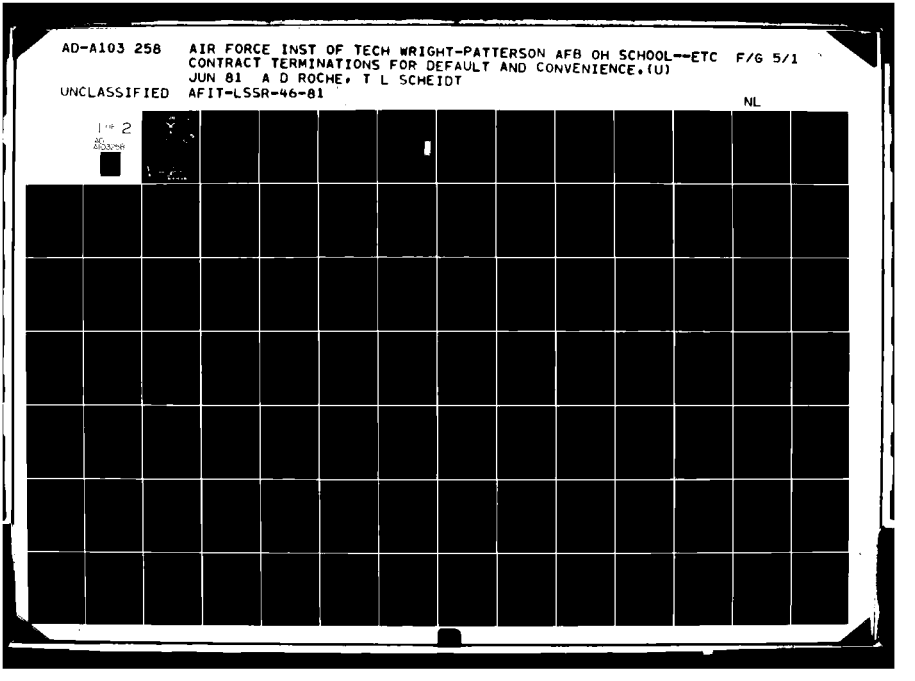

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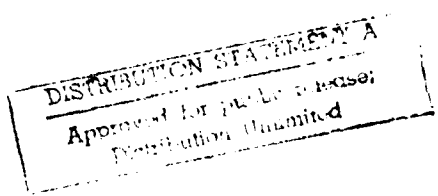
CONTRACT TERMINATIONS FOR DEFAULT AND CONVENIENCE

Andrew D. Roche, Captain, USAF
Theodore L. Scheidt, GS-12

LSSR 46-81

JUN 1981



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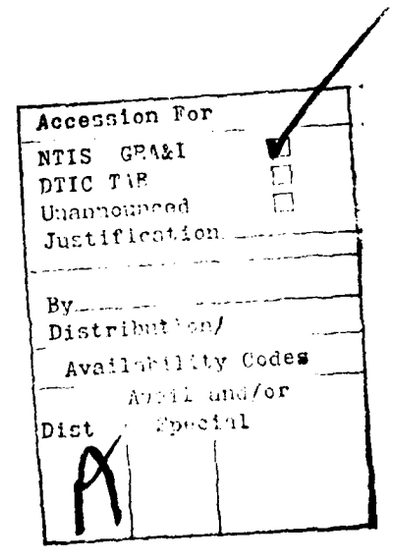

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SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

REPORT DOCUMENTATION PAGE	READ INSTRUCTIONS BEFORE COMPLETING FORM
1. REPORT NUMBER: LSSR 46-81	2. GOVT ACCESSION NO.: AD A103258
3. RECIPIENT'S CATALOG NUMBER	
4. TITLE (and Subtitle): CONTRACT TERMINATIONS FOR DEFAULT AND CONVENIENCE	5. TYPE OF REPORT & PERIOD COVERED: Master's Thesis
6. PERFORMING ORG. REPORT NUMBER	
7. AUTHOR(s): (10) Andrew D. Roche, ~~Captain, USAF~~ Theodore L. Scheidt, ~~GS-12~~	8. CONTRACT OR GRANT NUMBER(s)
9. PERFORMING ORGANIZATION NAME AND ADDRESS: School of Systems and Logistics Air Force Institute of Technology, WPAFB OH	10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS
11. CONTROLLING OFFICE NAME AND ADDRESS: Department of Communication and Humanities, AFIT/LSH, WPAFB OH 45433 (11)	12. REPORT DATE: June 1981
	13. NUMBER OF PAGES: 96 (12) 107
14. MONITORING AGENCY NAME & ADDRESS(if different from Controlling Office)	15. SECURITY CLASS. (of this report): UNCLASSIFIED
	15a. DECLASSIFICATION/DOWNGRADING SCHEDULE

16. DISTRIBUTION STATEMENT (of this Report)

Approved for public release; distribution unlimited

17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)

Air Force Institute of Technology (ATC)
Wright-Patterson AFB, OH 45433

18. SUPPLEMENTARY NOTES

16 JUL 1981

APPROVED FOR PUBLIC RELEASE AFR 190-17.

Fredric C. Lynch

FREDRIC C. LYNCH, Major, USAF
Director of Public Affairs

19. KEY WORDS (Continue on reverse side if necessary and identify by block number)

Contracting
Contract Terminations
Disputes
Termination for Convenience
Termination for Default

20. ABSTRACT (Continue on reverse side if necessary and identify by block number)

Thesis Chairman: Melvin Wiviott, J.D.

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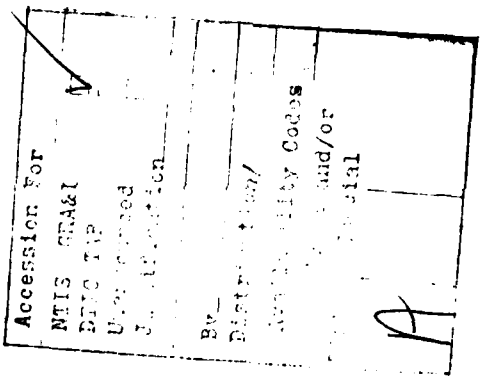
Unclassified

SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

Many contract termination actions initiated because of contractor default are subsequently executed for the convenience of the Government. This may result in the loss of the Government's right to recover excess reprocurement costs and other damages. The research effort was designed to determine the scope of the problem and, by analyzing individual cases, to identify common elements leading to termination conversions. United States Air Force contracts over a three-year period were studied, including both those terminations for default that were appealed to the Armed Services Board of Contract Appeals and those converted to termination for convenience by negotiation at the contracting officer level. The investigation was hampered by decentralized data but some conclusions were drawn, especially that most termination conversions are negotiated at the contracting officer level. The use of data base management systems was recommended so that data could be centrally collected for further research and management of this problem area.



LSSR 46-81

CONTRACT TERMINATIONS FOR DEFAULT AND CONVENIENCE

A Thesis

Presented to the Faculty of the School of Systems and Logistics

of the Air Force Institute of Technology

Air University

In Partial Fulfillment of the Requirements for the

Degree of Master of Science in Logistics Management

By

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June 1981

This thesis, written by

Captain Andrew D. Roche

and

Mr. Theodore L. Scheidt

has been accepted by the undersigned on behalf of the faculty of the School of Systems and Logistics in partial fulfillment of the requirements for the degree of

MASTER OF SCIENCE IN LOGISTICS MANAGEMENT
(Contracting and Acquisition Management Major)

DATE: 17 June 1981

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Chapter I

INTRODUCTION

THE TOPIC

The Air Force Business Research Management Center, in its 1979 "Acquisition Research Topics Catalog (24:34)," suggested the need to investigate problems involved with terminations of contracts for default:

> Many contract termination actions initiated because of contractor default are subsequently executed at the convenience of the Government. This conversion of termination actions from default to convenience results in the waiver of Government rights to claim recoupment for damages resulting from contractor failure to fulfill contractual obligations.

Contracting experience also indicates that the area of default terminations needs investigation. When contractor performance deteriorates to the extent that termination for default is contemplated, the need for contract administration escalates. Such a situation indicates a radical divergence in the interests of the contractor and the Government; administrative costs and legal costs often increase rapidly, and the need for discretionary action, and the exercise of good contracting judgment quickly increases.

BACKGROUND

The purpose of the following section is to define some terms, state some of the regulatory limits contained in the Defense Acquisition Regulation (DAR), and indicate initial limits on the scope of this investigation.

Contracting Authority

In the Department of Defense, a Contracting Officer is an agent of the Government given the authority to enter into, administer or terminate contracts and make related determinations and findings (29:1-201.3).

Significant for the limitations placed on this study is that in the Air Force all requests for default investigation must be assigned to a Termination Contracting Officer (TCO), who assumes full cognizance over the contract upon receipt of the assignment (28:8-652,para (b)).

Termination for Default

When one party in a contract fails to perform, the other may recover money damages for the breach of contract. When the contractor has failed to perform, the Government has the right to terminate the contract for default and may secure certain other rights through clauses inserted in the contract. One of the principal rights acquired by the Government under the default clause, according to Government Contract Law (18:157), is the right to repurchase the

item elsewhere and charge excess costs to the defaulting contractor. Other costs may also be charged to the defaulting contractor, such as moving Government furnished property to a replacement contractor's place of business, the administrative cost of readvertising, and the expense of added inspection (18:157).

The various failures on the part of the contractor for which the Government may terminate a contract are stated in clauses inserted in various types of contracts. The default clause in the fixed price supply contract gives the following reasons (29:7-103.11): Failing to make delivery within the time specified in the contract, failing to make progress so as to endanger performance of the contract, or failure to perform any other provision of the contract. Other contract clauses apply these basic failures to other situations, but it is beyond the scope of this thesis to treat them more fully.

Specific instructions as to what factors must be evaluated in considering termination for default are given in the DAR to the contracting officer. Before making any determination as to the type of termination, whether for default of the contractor, for the convenience of the Government, or a no-cost settlement, he should review the situation with procurement, technical and legal personnel (29:8-602.3(a)). If termination appears imminent, notice of that fact must be given to the contractor and certain

other interested parties, along with a reminder of obligation and a request for an explanation. If there is failure to deliver by the specified date, termination may be made immediately. If any other failure is involved, the so-called 'cure letter' should be sent, giving the contractor ten days or more to correct the failure. The cure letter may not be required, however, if there is insufficient time remaining in the contract period for correction. The Air Force DAR Supplement (28:8-650.2) adds other factors that must be considered: any changes under the contract or other action on the part of the Government which contributed to the cause of failure to perform; the possibility and advisability of collecting liquidated damages, if provided in the contract; and whether the contractor submitted an unrealistic schedule to obtain an advantage over competition.

It is important to remember that the contracting officer need not exercise the Government's right to terminate a contract if it is not in the Government's best interest to do so. Various administrative remedies are available instead (29:8-602.4). The contractor, the surety, or a guarantor may be permitted to continue with the contract under a revised schedule. The contractor may be allowed to continue by a subcontract, provided the Government's rights are protected. If the requirement no longer exists,

and no damages are owed to the Government, a no-cost settlement may be made.

When faced with the possibility of a termination for default, the contractor may defend himself in two ways. First, he may say that the Government's termination is improper, in which case he is not actually in default; secondly, he may say that his default is excusable. The second defense is a central consideration in every default situation (18:156). Excusable delays, for which a contractor may not be terminated for default, are listed in the default clause as including, but not limited to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather. Such causes must be shown to be beyond the control and without the fault or negligence of the contractor.

Termination for Convenience

Commerical contracts can normally only be terminated by mutual consent--otherwise breach of contract exists. The Government, on the other hand, because of its needs, has reserved the right to terminate contracts for its own convenience. This is done by incorporating various contract clauses into its contracts (18:162), which then require that the Government compensate the contractor for costs of performance and profit, but not anticipated profit, up to

the point of termination. The costs associated with the process of termination, such as shutting down a production line or disposing of the termination inventory will be reimbursed to the contractor, assuming, of course, that such costs meet the normal standards of allowability and allocability. Under a termination for convenience, the contractor is not liable for excess reprocurement costs.

Conversion from Default to Convenience

In Government contracting there are two types of terminations: default by the contractor or for the convenience of the Government (18:161). The no-cost settlement mentioned above (p. 3) and allowed by the DAR (28:8-203.51) is a type of convenience termination. The process of deciding whether to terminate a contract, in which way, and when to do so may be long, is constrained by regulations, and is complicated by the need to exercise careful judgment in uncertain circumstances. If the Government chooses to terminate for default and fault on the part of the contractor cannot be established, or if any Government action or inaction waives the rights of the Government, the default may need to be converted to one for convenience. Such a conversion will relieve the contractor of heavy liabilities.

The possible harsh consequences for the defaulting contractor are pointed out by Farr (9:2). If the contract

is terminated for default, the contractor will lose the right to continue the contract, and may be liable for excess reprocurement costs.

If the termination must be changed from default to convenience, there is a radical shift in the liability for costs from the contractor to the Government. The situation changes from one in which the contractor assumes the risk of performance (and even the risk of reprocurement costs and damages if there is failure to perform) to a situation which is in many respects similar to a cost reimbursement arrangement. To make matters worse, the Government may have to assume costs which, even though they are allowable, are inflated due to the inefficiencies and poor management of the failing contractor.

The contractor has the right to appeal the termination for default and/or the amount of any assessed costs of repurchase or damages. Usually the appeal is based on the disputes clause in the contract and goes before a Board of Contract Appeals; the contractor may, however, seek relief directly from the Court of Claims (18:145). This effort by the contractor may lead to a decision by the Board or the Court to overturn the default termination and change it to a termination for the convenience of the Government. In other cases, conversion may take place at various points earlier in the process through a negotiated settlement, perhaps because the Government case is considered too weak

to be sustained, or because other interests of the Government are involved.

PROBLEM STATEMENT

In Government contracting, a problem clearly exists when contract terminations initiated for default of the contractor must be actually executed for the convenience of the Government. There is a radical shift in liability for costs from the contractor to the Government, which in the process loses its rights to recover damages and reprocurement costs. The scope of the problem and the factors contributing to its occurrence needed to be studied.

LITERATURE REVIEW

A search was made for written reports and formal research efforts that dealt with the conversion of default terminations to convenience. The review included treatments of contract disputes and appeals, since the subject being investigated may be considered a subcategory of contract disputes.

General Studies

An analysis of the procurement function by Henry (13) dealt especially with the contract administration of delinquent contracts. He observed that the Government infrequently terminates a contract, usually only when the

contractor is hopelessly in trouble or the Government no longer needs the item (13:39). The general analysis does portray well the factors that often lead to inaction or delay resulting in the waiver of Government rights to terminate.

Riemer described the termination process and the contract clauses fully, but did not deal with the conversion of terminations from default to convenience in any detail (21:539). Government Contract Law presented an excellent summary of the topics of disputes, terminations, and remedies for the contractor and the Government, but gave only a brief treatment of termination conversions (18:172).

Scope of the Problem

No current consolidated data on the number of conversions of default terminations have been located. A study released by the General Accounting Office in 1957 (7) did give summarized data on the number of contracts and the total contract price of items terminated by the three military departments during the period July 1, 1953 through April 30, 1956. As a result of the 1209 contracts terminated for default during the period, there were 224 appeals; 126 decisions were made by the Armed Services Board of Contract Appeals. Forty-six appeals were sustained, 69 were denied (thus upholding the contracting officer's decision),

and 11 were dismissed (7:8). The report did not indicate reasons or key issues in the terminations.

Scales (22) discussed the circumstances prompting passage of the Contract Disputes Act of 1978. In an appendix he presented the number of appeals disposed of by the ASBCA during the period July 1, 1976 through September 30, 1977, the period immediately prior to the effective date of the new act. He broke down the figures by the principal contract clause involved in the dispute; the default clause was first or second as a cause for disputes (22: Appendix I).

Contract Disputes

Newman indicated that consolidated data on disputes could not be located (20:1), and suggested that the lack of data could be inhibiting management attention in potential problem areas. He studied Air Force contract disputes that were appealed to the ASBCA in an attempt to discover variables that would make early detection of potential disputes possible. Unfortunately he was not able to detect significant relationships by means of the statistical analysis he used. He did in fact recommend that case-by-case study might prove more enlightening than group data analysis (20:22).

In a similar study, Baxa and Hicks (2) studied appealed contract disputes by attempting to detect a

relationship with variables such as contract type, type of product, total contract value, tangible assets of the contractor, and total annual sales of the contractor. Using two levels of statistical analysis, they were able to establish statistically significant relationships. They concluded that dollar value of the contract might indicate a willingness or ability to appeal a dispute; business size was related to the occurrence of appealed disputes; the contract dollar value generally established an upper limit to the claim; and contractors in labor surplus areas tended to pursue the appeals process more actively. Complexity of technology was directly related to appealed disputes. One result of their study which is applicable to the present research is that terminations for default have risen in rank as a cause of disputes subsequent to the report of the Commission on Government Procurement in 1972 (2:61). The Commission cited specifications and drawings as the single largest cause. By the time of Baxa and Hicks' study in 1975, changes, termination for default, and changed conditions were respectively first, second, and third. All were more frequent contributors than specifications and drawings.

Sultemier and Underwood (23) also examined key issues in contract disputes appealed to the ASBCA. They first identified nine issues related to disputes and by statistical analysis determined that in the category of construction, key issues of defective specifications and

government acts were associated with disputes; in supply contracts, premature default and failure of preproduction samples were key issues; in services contracts only one issue, financial problems, was identified (23:41). The researchers constructed a lambda measure of predictability and determined that the ability to correctly predict dispute issues was improved 12.7 percent given prior knowledge of the category of procurement (23:35). Causality was not demonstrated.

Terminations

Several studies dealing with legal aspects of terminations were discovered. Jones surveyed regulatory and decisional law to determine the certainty of allowability of post-termination costs (16:7). The costs he studied, those following a termination for convenience, would be applicable also when a default termination is converted to a termination for convenience. Jones cited an ASBCA decision that a termination for convenience must be settled with the objective:

> to make the contractor whole for all of the direct consequence of the Government's exercise of its extraordinary reserved power to terminate performance, excepting the loss of anticipated profits on work not performed [16:13,note 38].

Another analysis of legal aspects treated predelivery defaults in Government supply contracts. Farr examined the theory and application of the rights the

Government has which are designed to prevent it from being obligated to continue with a contractor who either will not, or will not be able to, make delivery of supplies within the time specified in the contract (9:1). He examined contract failures termed 'failure to make progress' and 'anticipatory repudiation'.

In a thesis titled, "The Headaches of Default Termination," Wilson studied the default clauses in the fixed price supply and fixed price construction contracts. He stated that both the contractor and the Government have rights under the contract which must be protected. The failure of the Government to protect the rights of both parties frequently results in a default termination being converted to a termination for the convenience of the Government (31:1). It is because the costs to the government may be great that he discussed the contracting officer's problem areas in exercising the right to terminate for default. The thesis treats procedural problems, the theory of waiver, excusable delays and the exercise of discretion.

In a briefing paper written for contractors, Gubin (11) described the various excuses that have been used as defenses against default termination. As an attorney practicing in Washington, D.C., he kept a 'score card' during the period from 1966 through 1968 of the relative success with which various excuses were used (11:411). Reproduced in Appendix A, the score card represents the

excuses used before the Government agency contract appeals boards, the courts, and the General Accounting Office. An observation that Gubin made based on his own experience (11:411) is also relevant to the present research effort: Both legal rules and factual analysis are needed; each case involving default excuses is decided on the basis of the particular combination of facts of the case.

Conversion from Default to Convenience

Three studies were located which directly analyzed default terminations that were converted to convenience terminations. Howdyshell's method (15) was to survey all ASBCA decisions in the selected time period, 1 October 1977 through 30 September 1978, then study only Navy supply contracts where the ASBCA rendered decisions sustaining the appeal of the contractor. Nine of these were terminations for default later converted to convenience by order of the board. After examining the cases and regulations in detail, he developed a termination model in the form of a decision tree. Following the model, he stated, would have avoided all of the studied appeals (15:56). Howdyshell acknowledged the limits of his approach and did not claim applicability beyond the centralized Navy contracting system in which he worked (15:13). The problem attacked by him was that there seemed to be no on-going systematic effort to incorporate policy shaped by ASBCA decisions into the contracting officer's bank of knowledge.

Wallschlaeger undertook his study of termination conversions because of an alleged trend by the ASBCA to increase the frequency with which default terminations were converted to convenience (30:1). He collected data from the years 1970, 1971, 1973 and 1974. Using ratio analysis and linear regression, he concluded that, although the total number of conversions had increased, there was no increase in conversions relative to the total number of cases before the board. He listed 29 reasons for conversion (30:Appendix 12), and suggested that the correction of government deficiencies such as defective specifications, Government interference, and waiver of the delivery schedule would have reduced the rate of conversions (30:18). He recommended that an analysis be made of default terminations that are settled before board action.

The work done by Wallschlaeger was used as the basis for further research by Childers (5:7). His research paper attempted to identify trends in BCA decisions involving conversions, so that Government managerial attention could be directed to the unfavorable aspects of those trends. Childers selected a smaller number of the cases used by Wallschlaeger as a basis for comparing the contracting officer's stated reasons for termination to the Board's reason for converting the termination to convenience (5:7). During the years 1970, 1971, 1973, and 1974, and covering all the Boards of Appeal, 361 cases were identified in

which the contracting officer's final decision of a termination for default was appealed to the Board. Of the 361 cases, 17.5% were converted to a termination for convenience; Childers concluded from this that a substantial problem existed (5:10).

Childers used a matrix to display the relationship in 63 cases between the contracting officer's basis for a termination for default and the ASBCA's basis for converting the contract to a termination for convenience (5: Appendices 4 through 7). He then identified five cases in which the contracting officers' decisions were faulty, either because of failure to abide by regulation or the terms of the contract, or because of a failure, in the eyes of the author, to act as a prudent manager should (5:12). Childers claimed no definite results from his small base of data, but recommended further research and the use of existing resources to avoid improper Government action in the future (5:18).

In a US Army Procurement Research Office study, Knittle and Carr investigated ways to detect and avoid contractor defaults (17). They reviewed legal and regulatory material; analyzed 95 termination actions, which they considered representative of the experience of the US Army Materiel Development and Readiness Command (DARCOM); and interviewed 52 individuals in contracting and legal disciplines (17:8). Concentrating on expectant and actual

default, they developed a 'Prescriptive Model for Performance Management,' Chapter 2 of the study, which they recommended for use as a reference to basic doctrines and procedures (17:108). The model identified five decision points (Contract Strategy Formulation, Source Selection, Contract Management, Default Disposition, and Reprocurement Action), and selected indicators of three kinds.

At the contract strategy formulation stage, Knittle and Carr identified the urgency of the requirement and the estimated dollar value as indicators of the criticality of a possible default (17:19). At the same first stage and in the source selection stage, they identified predictive indicators of a possible default: purchase history, technical data factors, and market conditions; also apparent 'buy-in' bids and questionable responsibility of the contractor (17:28,40). During the contract management stage, adverse performance indicators were named: milestone slippage, lack of physical progress, technical difficulties, and financial problems (17:58).

Knittle and Carr concluded that several types of indicators of possible default were identifiable; about the magnitude of the problem of defaults within DARCOM, however, they reached no definite conclusions (17:105). They recommended better internal Government communication, use of their "Prescriptive Model for Performance Management,' and the implementation of some "relatively minor"

process improvements within DARCOM (17:107,109). For the purposes of the present research, the Knittle and Carr study is limited by its direct orientation to the experience of DARCOM and by its inconclusive results in regard to the scope of the problem, even in DARCOM. Nevertheless, their Prescriptive Model is an ambitious attempt to include legal principles, Defense Acquisition Regulation requirements, and wide contracting experience in a performance management model. This model, in spite of its DARCOM orientation, appeared useful as background against which to make the case by case analysis contemplated in the present study.

SUMMARY

The initial impetus for this research came from the suggestion by the Air Force Business Research Management Center to study contract terminations for default that were subsequently converted to terminations for the convenience of the Government. Such conversions often mean that the Government has lost the right to assess excess reprocurement costs and to recover other damages. A search of the available literature revealed that the entire scope of the problem had not been studied. A number of researchers examined disputes, but they made statistical analyses of grouped data that could not contribute significantly to the present study (2; 20; 23). Several studies analyzed legal aspects of terminations but did not treat the scope

of the problem or deal with converted terminations in detail (9; 16; 31). Several researchers examined selected areas of the problems of termination at the Board of Contract Appeals level (23; 30; 5). One study appeared to be particularly useful for the analysis contemplated in this present research (17). No study was found which examined either disputes or conversions which were settled by negotiation below the Board of Contract Appeals level. The need for further study was thus established.

OBJECTIVES

The specific objectives of this research effort were to:

1. Evaluate the scope of the problem of contract default terminations that are converted to terminations for the convenience of the Government.
2. Perform analysis on a case by case basis to discover patterns, if such exist, of common elements present in conversion cases.
3. Provide information that may be used in setting policy or establishing procedures in order to reduce the negative impact of conversions.

RESEARCH QUESTIONS

1. What is the scope of the problem? This study attempted to determine the relative size of the

following categories in comparison with total contracting actions and dollar amounts:

a. Terminations for default of the contractor.

b. Conversions of terminations for default to terminations for the convenience of the Government by formal direction of a Board of Contract Appeals or the Court of Claims.

c. Conversions prior to such formal direction.

2. What common elements can be found that contribute to conversion of contract terminations for default to terminations for the convenience of the Government? Analysis of specific contracts was performed to identify common factors in the following three general areas:

a. Contractor excuses.

b. Improper Government actions.

c. Other factors.

Chapter II

METHODOLOGY

LIMITATIONS OF SCOPE

This research effort is limited to the study of contracts with the United States Air Force because of data availability and because USAF contracting is a large enough area to warrant investigation. In regard to data availability, the Air Force has a central point of control for legal review of contracting officer final decisions, for legal review of termination actions, and for litigation of cases before the ASBCA. This agency, the Directorate of Contract Appeals (AFLC/JAB), is located with its records at Wright-Patterson AFB (28:8-650.3). Limitation of the scope to Air Force contracts is made primarily for reasons of data availability, but the area investigated is still large enough to be of significant value.

THE OPERATIONAL MODEL

The process involved in the termination of contracts for default and the conversion of some contracts to terminations for convenience will now be restated in operational terms. In other words, specific actions and decision

points will be identified to indicate the points for data collection.

A major step in the process of terminating a contract for default is taken when the Principal Contracting Officer (PCO) sends AF Form 3056 (Termination Authority) to the Termination Contracting Officer (TCO) with the recommendation for termination for default of the contractor. Thereafter the TCO takes full cognizance of the contract (28:8-652,para (b)), exercises independent judgment as to what action should be taken (28:8-560,3,para (b)), and issues the termination notice, if appropriate. During the default investigation, the TCO enters the case on a default termination docket (28:8-852), and coordinates with the Staff Judge Advocate, HQ AFLC, as to the existence of an actionable default (28:8-650.3, para (b)).

If the termination is appealed by the contractor to the Board of Contract Appeals (or in a small proportion of the cases, to the Court of Claims), the Board notifies the Staff Judge Advocate, HQ AFLC. If the termination under the default clause is subsequently reversed by the ASBCA, and a motion for reconsideration is not made by the Government, or is denied, the TCO will, upon receipt of the copy of the ASBCA decision from AFLC/JAB, issue a notice of conversion changing the termination to one for the convenience of the Government (28:8-652, para (e)).

Conversion of the termination to one for convenience may, and often does, take place by negotiation prior to any formal action of the Board. Such a settlement is encouraged by the Contract Disputes Act of 1978, according to the Armed Services Board of Contract Appeals report of its activities ending 30 September 1980 (1:3). The number of such negotiated settlements increased during Fiscal Year 1980 (1:3).

DATA COLLECTION

Contract Universe

The investigative universe was composed of all Air Force contracts.

Contract Population

The population studied was composed of all contracts referred to AFLC/JAB for legal review prior to a Contracting Officer's final decision.

Data Limits

Several sources provided data for this research. Answering research question number one, "What is the scope of the problem?", required general or summarized data on the total number and dollar amount of Air Force contracting. This was to be compared to the number and dollar amount of contracts that were terminated for default; the same information was also to be compared to the number of

contracts that were converted from default to convenience. Answering research question number two, "What common elements can be found that contribute to conversion of contract terminations for default to terminations for the convenience of the Government?," required information derived from particular cases. The application of general principles to specific contracts was to be studied.

As this research began, it appeared that all the case study data were available at AFLC/JAB. During preliminary research this did not prove to be true, and a sampling plan was developed. The geographical distribution of the data and constraints of time made the gathering of data for the whole contract population impossible.

The temporal parameters for this research were set to include the three calendar years 1978 through 1980. Particular contract actions, whether they were contract awards, terminations, conversions or negotiated settlements were studied only if they took place within the three year period. The objective in establishing this period was to select a time span long enough to make it possible to answer the research questions while including the most recent period for which data were available.

Data Collection, Stage One

The data collection was divided into three stages (Appendix B displays data sources and research questions as

a matrix). The first stage of data collection involved the gathering of summarized data from the Contract Support Division, Directorate of Contracting and Manufacturing Policy (AF/RDCX) (26). Data on total Air Force contracting gathered in this stage provided part of the base against which the scope of the problem of converted terminations could be measured, thus answering research question one. The Armed Services Board of Contract Appeals (1) provided summarized data on its own work load. The original research plan also included inquiry of data reported to HQ USAF (AACC), Contract Finance Office, Comptroller (28:8-650.3,para (b)(3)), but no helpful information was secured from this source.

Data Collection, Stage Two

The second stage of data collection dealt with all contracts in the population stated above. The entire population--in statistical terms, a census--was examined to identify cases initially terminated for default but ultimately terminated for the convenience of the Government due to a decision of the ASBCA, or the Court of Claims.

Several sources were necessary for the collection of data in stage two. These sources are listed in the following paragraph.

The original research plan included inquiry of case data through Federal Legal Information Through Electronics (FLITE), maintained by the Office of the Judge Advocate

General, USAF, in Denver, Colorado (AF/JAESL), but this source provided no useful data (10). Published decisions of the Armed Services Board of Contract Appeals (ASBCA) (3) provided data on the cases terminated for default which were heard by it.

Since the enactment of the Contract Disputes Act of 1978, appeals may be made directly to the Court of Claims. A few appeals related to Air Force contracts are currently pending before the Court, but none have yet been decided (8). Consequently references will be made in this thesis to the Board of Contract Appeals without always referring to the Court of Claims as well.

The published decisions were surveyed to identify all Air Force contracts; these were then scanned to select contracts in which termination for default was an issue. Finally cases in which the termination was converted from default to convenience by a formal decision of the Board or Court were identified for later case by case analysis.

Data collected in stage two provided summarized data on appeals to the ASBCA, especially the number of cases dealing with default and those converted to a termination for convenience. These data were compared with data collected in stage one in order to answer research question one. Stage two collection of data also involved identification of particular cases to be studied in order to answer research question two.

Data Collection, Stage Three

In the third stage, data were collected about cases terminated for default but then converted to termination for convenience by a negotiated settlement at the contracting officer level. In other words, conversions of terminations that did not involve a decision by the ASBCA were studied at this stage. Summarized data were collected to answer research question one and individual cases were identified to be studied in answering research question two.

Preliminary research indicated that there was no central data collection for such cases, and that data existed only in the docket records of the TCOs throughout the Air Force. The research team could not gather information on all Air Force contracts in which the termination was converted from default to convenience without a decision by the Board or the Court. For this reason a sampling plan was developed. Both judgment sampling[1] and convenience sampling[2] were necessary.

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[1]A judgment sample is based on the researcher's own judgment that the sample is representative of the population even though statistical sampling could not be employed (19:183).

[2]A convenience sample is a sample of the population that conveniently happens to be at hand. No claim is made that the convenience sample represents the whole population (19:183).

The judgment sample picked to represent the Air Force as a whole was Air Force Logistics Command (AFLC). Two of the contributing reasons for picking AFLC were that it composes a large proportion of Air Force contracting and that a valid sample could be gathered. This judgment was confirmed by later research as indicated in Chapter 3. Data for the judgment sample were provided from the computer records of the Office of the Staff Judge Advocate (HQ AFLC/JAB) at Wright-Patterson AFB (27). Other data were supplied by the Termination Contracting Officers (TCOs) of the Air Force Logistics Command. They were located at Wright-Patterson AFB, Ohio and at the five Air Logistics Centers: Hill AFB, Utah; Kelly AFB, Texas; McClellan AFB, California; Tinker AFB, Oklahoma; and Warner Robins AFB, Georgia. A portion of the summarized data for the judgement sample was provided by the Office of DCS/Logistics Management Systems (AFLC/LMV) (25).

The judgment sampling also provided data from the dockets of the TCOs on the number of terminations for default and converted cases, and on the dollar value of converted cases for AFLC contracting during the three-year period. These data were used to answer research question one.

Answering research question number two required case by case analysis of converted cases. Data were available in the published decisions of the ASBCA for cases

converted by a formal decision of the Board. For cases converted prior to a Board decision, however, convenience sampling was necessary.

The researchers found that converted cases could be identified from the dockets of the TCOs, but the contracts could only be analyzed by retrieving the retired files from remote storage in numerous locations. Constraints on time and funds made it impossible for the research team to travel to the five Air Logistics Centers, nor could all the contract files be duplicated for study at a central location. For these reasons, a convenience sample, without claiming any statistical representation, was taken from two of the locations. Through the generous cooperation of the two TCOs, retired contract files were made available at the Contracting Division, 2750 ABW/PM, Wright-Patterson AFB; other contracts were duplicated and mailed for study from Sacramento Air Logistics Center, McClellan AFB.

Data Analysis Methods

Answers to the two research questions were sought by analyzing the data in stages that corresponded to the stages of the data collection. Appendix B displays the relationship between the data sources and the research questions.

Research Question One

Summarized data gathered in all three stages were analyzed in answering research question one. Information gathered in stage one on contract actions and dollar amounts for contracting throughout the Air Force formed the base against which data gathered in stages two and three were compared.

Stage two data, dealing with all Air Force contracts appearing in ASBCA decisions, were compared with the data gathered in stage one. By this process the scope of the problem of contract terminations for default appealed to the ASBCA and subsequently converted by a decision of the Board to a termination for convenience was evaluated in relationship to all Air Force contracting.

Stage three data, dealing with Air Force contracts terminated for default and subsequently converted to a termination for convenience by negotiation at the contracting officer level, were compared with the data gathered in stage one. By this process the scope of the problem of contract terminations for default subsequently converted to terminations for convenience without a decision by the ASBCA was evaluated in relationship to all Air Force contracting.

Research Question Two

Analysis of individual cases in the process of answering research question number two was carried out in two steps. In the first step, cases decided by the ASBCA or the Court of Claims were studied. In each case a search was made for the positions taken by the contractor, the contracting officer, and the ruling body. Each case was summarized in an appendix. Matrices were used to display the contracting officer's bases for terminations on the one axis and the reasons for conversion of the termination on the other. Contractor excuses, improper Government actions, and other factors leading to the conversion were analyzed on the basis of the DAR, principles of contract law, and studies included in the literature review, notably the one by Gubin (11).

In the second step of the case by case analysis, the amount of data was much less. The expert opinion of the ruling body was, of course, lacking in the cases settled by negotiation prior to a Board decision. Also, the entire contract file was not always available. Consequently, the patterns discovered in the first step of the analysis were used as a base line against which exceptional elements in the cases were sought. Again, each case was summarized in an appendix. The use of convenience sampling required careful limitation of the conclusions.

Study Assumptions and Limitations

It was assumed that the period of time under study was of sufficient length to provide a valid data base and that the contracts selected for this study represented a cross section of Air Force cases. Any data missing from the ASBCA decisions or from the TCO dockets were assumed to be due to random human error; data received by telephone were assumed to be accurate and valid information.

Lack of time to gather data which was more widely dispersed than anticipated was a limitation in this research. The appeals process is by its nature lengthy, with a span of some years often separating the award of a contract and the resolution of an appeal of a contracting officer's final decision in a dispute. Nevertheless, it was assumed that variations in the time of the process were randomly distributed and valid comparisons could be made.

Chapter III

RESEARCH FINDINGS

This chapter presents the results of the data collection and case by case analysis described in Chapter two.[1] The results are provided in the same sequence as the research questions.

RESEARCH QUESTION ONE

The first research question was, "What is the scope of the problem?" Data on total United States Air Force contracting actions and dollar amounts were collected as a base against which the following categories could be compared:

a. Terminations for default of the contractor.

b. Conversions of terminations for default to terminations for the convenience of the Government by formal direction of a Board of Contract Appeals or the Court of Claims.

c. Conversions prior to such formal direction.

The summarized data gathered from the Contract Support Division, Directorate of Contracting and Manufacturing Policy (AF/RDCX), contain only contract actions and dollar

[1]Appendix B displays the various data sources.

amounts for the entire Air Force (Table 1). These actions and dollar amounts are further broken down into contract actions of $10,000 or less (reported on DD Form 1057) and contract actions over $10,000 (reported on DD Form 350). The information contained in Table 1 will be compared later in the chapter with summarized data on contracting actions and dollar amounts from the Air Force Logistics Command (AFLC) in Table 5.

TABLE 1

SUMMARIZED DATA ON AIR FORCE CONTRACT ACTIONS AND DOLLARS

	FY78	FY79	FY80
Contract Actions			
$10,000 and under	3,094,895	4,016,678	4,164,153
Over $10,000	72,008	78,097	86,456
Total	3,976,903	4,094,775	4,250,609
Actions by Dollars (000)			
$10,000 and under	$ 1,750,433	$ 1,892,540	$ 2,097,628
Over $10,000	$18,163,054	$18,255,629	$22,583,373
Total	$19,913,487	$20,148,169	$24,681,001

Source: AF/RDCX (26)

Research Question 1a

No data could be gathered on the total number of terminations for default, since no central reporting of such information is made. It was originally thought that such information could be gathered from the records of the Staff Judge Advocate (HQ AFLC/JAB), where a legal review of every Air Force contracting officer's final decision to terminate a contract for default is made. Records are not kept there, however, of the results of the legal review, that is, whether or not the termination is actually made. Research question 1a could not be answered.

Research Question 1b

The Armed Services Board of Contract Appeals (ASBCA) Report of Transactions and Proceedings (1) contained data on their activity over the last five fiscal years, 1976 through 1980. The data was not usable for this research, however, principally because the number of appeals involving a termination for default was recorded, but not the disposition. The number of appeals was recorded in the summarized data, but not whether the appeal was sustained or denied. The Trial Commissioner who was responsible for the production of the report stated that the present system for recording appeal information could not provide the number of default terminations that were converted to terminations for convenience (4).

The results of reviewing all published ASBCA decisions for the calendar years 1978 through 1980 are presented in Table 2. Because of the small number of cases, comparisons could be made only for the three-year totals. There were 175 docketed Air Force cases; of this number 34 cases involved a termination for default (T for D).[1] The number of T for Ds converted to terminations for the convenience of the Government (T for C)[1] for the three calendar years was seven.

The latter half of Table 2 contains the comparison of the categories to one another. For the three-year period, the number of docketed Air Force cases (175) was 17.08% of the total number of cases (1024) docketed by the ASBCA. Cases converted to T for C composed 4.0% of all Air Force cases. Cases converted to T for C composed 20.5% of the total number of Air Force cases in which a T for D was appealed.

Two areas not resolved for research question 1b were determining the dollar amounts for T for Ds and T for Cs. Not enough of the published cases contained the dollar amount of the original contracts or of the portion terminated to make data collection possible. The use of Federal

[1]Termination for default of the contractor is abbreviated T for D. Termination for the Convenience of the Government is abbreviated T for C. A contract terminated for default of the contractor and subsequently converted to a termination for the convenience of the Government is referred to as converted to T for C.

TABLE 2

ASBCA DECISIONS

Docketed Cases	CY1978	CY1979	CY1980	Total
Total number of ASBCA cases	343	371	310	1024
Air Force Case	62	63	50	175
Air Force Cases involving T for D	9	13	12	34
Air Force T for Ds converted to T for C	4	1	2	7

Source: BCA decisions (3)

Three Year Total Comparison

Air Force cases as a percentage of docketed cases	17.08%
Cases converted to T for C as a percentage of all Air Force cases	4.0 %
Cases converted to T for C as a percentage of Air Force T for D cases	20.5 %

Legal Information Through Electronics (FLITE) (10) was limited because 1979 and 1980 information had not been recorded by them at the time data were gathered. This did not limit the research because the source of FLITE data is the same published information (3) used by the researchers for this study. Another data limitation was that none of the cases appealed to the Court of Claims had yet been decided and so were not available for study (12).

Research Question 1c

In order to investigate the scope of the problem of contracts converted to T for C without formal direction from ASBCA (Research Question 1c), the use of a judgment sample was necessary (see above, p. 27). The choice of AFLC as a sample representative of the Air Force appears to be a good one on the basis of data collected in order to answer Research Question 1c.

The researchers counted all the legal reviews performed at AFLC/JAB of Air Force contracting officers' final decisions concerning T for Ds. The review was limited to the only two years of data available on the computer records, 1979 and 1980. In the two years, AFLC had 80.3% and 74.22%, respectively, of all the legal reviews of terminations for default for the entire Air Force.

The results of the judgment sample are provided in Tables 3 and 4. Table 3 contains the total number of terminations for default in the calendar years 1978-1980 for AFLC. The total number of terminations for default for the judgment sample was 511. Table 4 is in the same format as Table 3 but contains T for Ds which were converted to T for C. Also included in Table 4 is the percent of AFLC T for Ds which were converted to T for C. Of the total number of T for Ds in AFLC during the three-year period (511), the number of contracts converted from T for D to T for C (64) composed 12.5%. Because the number of converted cases

TABLE 3

AFLC TERMINATIONS FOR DEFAULT

	CY1978	CY1979	CY1980	Total
Hill AFB	20	39	36	95
Kelly AFB	12	21	13	46
McClellan AFB	41	33	42	116
Tinker AFB	37	45	70	152
Warner Robins AFB	29	37	29	95
Wright Patterson 2750th/ABW	2	1	4	7
Total	141	176	194	511

Source: AFLC TCOs

TABLE 4

AFLC TERMINATIONS FOR DEFAULT CONVERTED

TO TERMINATIONS FOR CONVENIENCE

	CY1978	CY1979	CY1980	Total
Hill AFB	0	1	0	1
Kelly AFB	3	19*	0	22
McClellan AFB	12	8	8	28
Tinker AFB	1	4	1	6
Warner Robins AFB	1	2	2	5
Wright Patterson 2750th/ABW	2	0	0	2
Total	19	34	11	64

Source: AFLC TCOs

Three Year Total Comparison

AFLC cases converted to T for C as a percentage of AFLC T for D cases 12.5%

*Includes 17 contracts terminated as a result of one bankruptcy.

was so small, the results were easily affected by other factors. One of the other factors is noted at the bottom of Table 4. The bankruptcy of one contractor resulted in the termination for default of 17 contracts. These contracts were converted to T for C as part of a negotiated settlement securing data rights for the Government. If these 17 contracts had been counted as one, the percentage of AFLC T for Ds converted to T for Cs in the three-year period would have been 9.4% instead of 12.5%.

The results of the inquiries to the AFLC Office of DCS/Logistics Management Systems (AFLC/LMV) are provided in Table 5 and are broken down by contract action and dollar amount. The researchers could not gather any summarized data on the total dollar amount of contracts terminated for default for AFLC. A limited comparison was made between Table 1 and Table 5. The total contract actions in Table 5 were divided by the total contract actions in Table 1 for each fiscal year in the tables. AFLC had 12.9%, 13.16%, and 12.63% of the Air Force contract actions for fiscal years 1978-1980.

No comparison of dollar amounts between T for Ds and T for Cs was made. Such information was recorded only in the logs of the various TCOs. Variety of individual recording methods made comparison impossible.

TABLE 5

SUMMARIZED DATA: AFLC CONTRACT ACTIONS AND DOLLARS

	FY78	FY79	FY80
Contract Actions			
$10,000 and under	477,472	499,334	492,861
Over $10,000	36,278	39,870	44,748
Total	513,750	539,204	537,609
Actions by Dollars (000)			
$10,000 and under	$ 428,612	$ 475,085	$ 471,232
Over $10,000	$4,506,769	$5,503,144	$6,486,602
Total	$4,934,381	$5,978,229	$6,858,914

Source: AFLC/LMV (25)

RESEARCH QUESTION TWO

The objective of the analysis employed in answering research question two was to discover common elements contributing to the conversion of contract terminations for default to terminations for convenience of the Government. In seeking common elements, the goal was to discover repeated patterns, not to record a complete analysis of each case or to make a judgment on the appropriateness of each action taken by the contractors or contracting officers. Unfortunately, the small number of cases made identification of common elements quite difficult. The analysis will be reported in two stages, first for cases decided by the ASBCA, then for cases in which a settlement was negotiated prior to a decision by the Board. In each stage, the three general areas that were considered were contractor excuses, improper Government actions, and other factors.

ASBCA Cases

Seven cases were identified for the three-year period, 1978-1980, in which a T for D was converted to a T for C by a decision by the Board. The cases were summarized in Appendices C through I. A matrix (Appendix J) displays the relationship of the contracting officer's basis for termination for default and the ASBCA's reason for converting the termination to one for the convenience of the Government. The search covered all known USAF cases.

Analysis of the contractors' excuses was performed by comparing the defense made by the contractor with the list of default excuses used by Gubin (11:412). His list is contained in Appendix A. The small number of cases did not permit any confident frequency analysis within the seven cases themselves. Each one of the excuses in the seven cases can be found in Gubin's list. In addition, an example of each of Gubin's twelve excuse categories can be found among the seven cases, as is shown in the following paragraph.

The list of contractor excuses found in the seven cases described in Appendices C through I (the cases are referred to below by the appendix letter) is not stated to be representative. The comparison with Gubin's categories, however, does show the types of elements commonly appearing in T for Ds converted to T for Cs:

'Defective specifications' appeared in cases C and G; in both cases the specifications were so vague that they could not guide performance.

'Inspection and testing' was an issue in case F; requirements more stringent than those in the contract were imposed.

'Financial problems' also were claimed in case F; this was an effective excuse only because Government action contributed to the depletion of the contractor's financial resources.

'Impossibility of performance' in case I depended on a situation unknown at contract award; this was an instance of practical impossibility.

'Government action' is a category which Gubin uses (11:414) to cover both inaction when there is a duty to act and action interfering with the contractor's performance; this element was a factor in cases C, D, E, and F, and will be discussed in a succeeding paragraph.

'Substantial performance' was a factor in case F, although not the major factor; overly stringent testing rejected what was substantially satisfactory performance.

'Subcontractor fault' in case H was a strike beyond the control of both prime contractor and subcontractor.

'Premature default' in case F will also be discussed below, with

'Defective cure notice', a factor in the same case.

'Waiver of due date' was present in cases D and E; in one case the contracting officer did not allow sufficient time for correction after notifying the contractor of a need to do so just before the occurrence of the due date. In case E, performance long beyond the due date, with the Government's knowledge, waived the right to terminate for default.

'Preproduction sample' is a category of excuse appearing in case F, noted above.

Gubin's last category, 'Miscellaneous', includes labor problems (case H), weather, acts of God, and others. The comparison just made indicates that the default excuses cited by Gubin (11) are still an effective description of elements common to recent contract default terminations.

In addition to contractor excuses, the case analysis sought to identify examples of improper Government action. It was expected that most, if not all, of the cases isolated at this stage would contain examples of improper Government action, since the selection procedure identified for analysis only cases in which the contracting officer's final decision to terminate for default was overturned by the Board. Cases in which the decision to terminate was sustained by the Board were excluded from consideration; such cases would have contained a far higher proportion of proper and prudent Government action.

Remembering that patterns of common elements were sought, not an analysis of each improper action, and remembering that the small number of cases made firm conclusions impossible, some tentative findings could still be made. In the previous discussion of Gubin's category of 'Government acts' (11:414), cases C, D, E, and F were mentioned. Cases C and F were alike; in both instances the improper Government act that excused the default was an overly strict imposition of a vague testing standard. Cases D and

E were similar because waiver of the Government's right to insist on the delivery data took place. In case D, termination was too quick, not allowing a reasonable time for correction of a deficiency; in case E, termination action was taken after too long a time. Government inaction, allowing the contractor to continue performance for a significant period of time after the delivery date, waived the Government's right to terminate. In each of the four cases (C, D, E, F), it was the particular set of circumstances that made the Government action untimely or unwise.

Analysis of cases converted from T for D to T for C by action of the ASBCA revealed one other factor which may tentatively be identified. Three of the cases included the imposition of a standard which was contrary to industry practice, a factor contributing to conversion of the T for D to T for C. In case C, the Board found that the standard for the amount of bubbles visible in a potting compound could not be supported by any industry standard. In case F, the Government refused to allow correction of stitching, contrary to industry standard. In case G, a specification for tennis court resurfacing was contrary to industry standards; the specification was written by a Civil Engineer who had many years of experience in other areas but none in that particular type of work.

Cases Negotiated Without an ASBCA Decision

Because of the impossibility of collecting data from the entire Air Force on cases converted from T for D to T for C without a decision of the ASBCA, a convenience sample was used. As described in the previous chapter, a convenience sample is used when it is the only available data at hand (28:183). No statistical representation is claimed, and no firm conclusions can be drawn.

The convenience sample was composed of cases provided by the TCOs at Wright-Patterson AFB, Ohio, and McClellan AFB, California. Seven cases were received from the two sources; they were summarized in Appendices K through P, and were numbered 1 through 7 in the chronological order of their respective final contractual actions, beginning with the oldest case (In order to conveniently differentiate them from the ASBCA level cases, these will be referred to as cases K1, L2, M3, M7, N4, 05, and P6).

Appendix Q displays in a matrix the relationship between the contracting officer's basis for termination and the reason for conversion to convenience or other disposition. Other dispositions are included because only two cases (K1 and N4) exactly fit the definition of cases initially terminated for default of the contractor but subsequently converted to a termination for the convenience of the Government without a decision of the ASBCA. Other cases were included because they were received with the

convenience sample and were similar in some ways to the others; also they were included in order to expand the discussion beyond two cases.

Analysis of the cases revealed some patterns of similarity and some reasons why the cases that do not exactly fit the definition may still be discussed with the two that do. Case L2 was never actually terminated for default; the T for D was not carried through by administrative oversight. The case was finally terminated for convenience. Cases M3 and M7 are given in the same Appendix M because of their similarity; both were supply contracts in which the material was delivered and accepted by receiving personnel between the time the T for D documents were sent and the time they were received. It was in the Government's best interest to reinstate the contracts and pay for the material. Cases 05 and P6 were similar in that the T for D was executed for failure to deliver, but then circumstances changed, the contractors requested reinstatement, and such action was taken. In none of the four cases just mentioned (M3, M7, 05, and P6) was there an actual T for C. In the context of a Government remedy for failure to deliver, the remedy was not T for D, then reprocurement, but T for D, reinstatement, and delivery by the original contractor.

The remaining cases were also analyzed in the context of the need for a Government remedy for default. Case

K1 was converted to a T for C, neither for improper Government action nor for a contractor's excuse, but because the best interest of the Government made negotiation of three contracts together the best remedy. Converting the one contract from T for D to T for C was part of the process of settling the disputes on two other contracts.

The remaining two cases, L2 and N4, were clear cases of improper Government action actually or potentially waiving Government rights to terminate on the basis of the delivery date in the contracts. In case L2, design assistance too close to the delivery data waived the right to terminate; then, after setting a new date, administrative mistakes appeared to have constituted waiver again, and it was in the best interest of the Government, considering other factors, to terminate for the convenience of the Government. In case N4, a meeting held between Government and contractor personnel after the expiration date (a meeting at which T for D was not discussed and which led the contractor to believe a contract change would be made) made waiver a good possibility, and a negotiated T for C settlement was executed.

Because of the small number of cases discovered at this level, no firm patterns could be identified. There were not enough cases to find common elements contributing to the conversion of terminations from default to convenience. The cases that were analyzed were not found to be

different from the ASBCA cases except in one major respect. As was to be expected from the selection process, the ASBCA level cases were ones in which the lack of agreement was so great as to result in an appeal; the only cases studied were ones in which the contracting officer's decision was overturned. On the other hand, cases studied below the ASBCA decision level were ones in which an agreement was reached between the contracting officer and the contractor, either to convert the termination from default to convenience, or to reinstate the contract in the best interest of the Government.

Chapter IV

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

This chapter is composed of a summary of the research findings, conclusions, and recommendations in the area of USAF contracts terminated for default of the contractor and subsequently converted to a termination for the convenience of the Government.

SUMMARY

Research Question One

Data were gathered in summarized form on total USAF contracting actions and dollar amounts for the 1978-1980 period as a basis against which to evaluate the scope of the problem.

No data could be gathered on the total number of terminations for default across the whole Air Force, so Research Question 1a could not be answered.

The researchers were able to determine the scope of the problem at the level of contracts appealed to the Armed Services Board of Contract Appeals (ASBCA). None of the cases appealed to the Court of Claims had yet been decided and so were not available for study. Air Force cases appealed to the ASBCA because of a termination for default

(T for D) were identified, as were those converted from T for D to a termination for convenience (T for C). For the three year period, the USAF cases (175) made up 17.08% of all the cases on the ASBCA docket. Cases converted to T for C (7) composed 4.0% of the Air Force cases and 20.5% of the Air Force T for D cases. The monetary scope of the problem could not be determined due to data deficiencies.

The scope of the problem of contracts converted to T for C without a decision of the ASBCA was determined by using the Air Force Logistics Command (AFLC) as a judgment sample to represent the Air Force. Of the total number of AFLC T for Ds during the three-year period (511), the number of contracts converted to T for C composed 12.5%. The monetary scope could not be determined.

Research Question Two

For the three-year period under study, seven cases were identified as converted to T for C by a decision of the ASBCA. Analysis of the small number of cases did not permit conclusions about common elements within the sample itself. Comparison with other descriptions of such cases, especially a treatment of contractor default excuses by Gubin (11), showed that the cases studied were not notably different from those previously experienced.

Analysis of the cases for detection of improper Government acts showed that relatively more frequent

problems were found in the areas of defective or ambiguous specifications, testing criteria that were contrary to industry standards, and untimely Government action leading to waiver of the delivery date.

A convenience sample was used to identify cases which were converted to T for C without a decision of the ASBCA. Only three cases fit the selection criterion well, but four others were studied in the context of Government remedies for contractor default. Problems were discovered especially in Government actions waiving the delivery date. These cases were not found to be different from the first group except that negotiated settlements were the pattern, as expected.

CONCLUSIONS

The research questions could not be wholly answered due to lack of data, especially in the area of the number and dollar value of terminations for default. Nevertheless, some conclusions could be drawn.

Research Question One

The number of contracts terminated for default and the number converted to T for C are small in comparison to all Air Force contracts, as was expected. The number of T for Ds handled at the contracting officer level without appeal is much greater than the number of those appealed

to the ASBCA, but the percent of T for Ds converted to T for C was higher for those appealed to the ASBCA than for those converted to T for C by negotiation at the contracting officer level.

Research Question Two

The pattern of contractor excuses and improper Government acts could not be shown to be different from patterns described in previous literature. It continues to be true that in handling contract terminations, the contracting officer must act with prudent judgment. Besides a knowledge of legal principles, he needs a knowledge of particular facts in the case to act in a timely manner so that the best interests of the Government are served.

General

An important conclusion based on the entire research effort can be drawn. It is based on three particular elements and leads directly to the recommendations.

First, the great majority of T for Ds and conversions of contracts to T for Cs takes place at the contracting officer level rather than the ASBCA level.

Second, the fact has been established that the contracting officer must act with judgment in uncertain circumstances, and often under the pressure of time, when a contract default is imminent and a Government remedy is needed.

Third, management information in regard to T for Ds and the conversion of contracts to T for Cs is not being collected and made available to managers as well as it could be. Such a lack of data hampered the present research and may be hindering management action as well.

It can be concluded, therefore, that the contracting officer level is at least as important as the ASBCA level for dealing with the problem of contract terminations for default and for convenience. This is true also for future research into the area.

RECOMMENDATIONS

The researchers believe that benefits for the Air Force may be gained through further research in this area, through better training of contracting personnel, and through improved procedures for handling contract terminations. All of these benefits, however, seem to be dependent on improved data collection and management.

Most of the sources approached by the researchers had some computerized data management, but were unable to gather the kinds of data that were sought. Two specific examples, for which improved data management is recommended, will be cited.

When a final decision of a contracting officer is sent to the Office of the Staff Judge Advocate (AFLC/JAB) for legal review, their computer is used to set up a

suspense file for the review. Once the review is made and sent to the contracting officer, the suspense is closed. The TCO--in the case of a final decision involving a contract termination--is not required to inform AFLC/JAB of whether or not the termination is carried out. As a result AFLC/JAB could not inform the researchers of the action following their legal reviews. It is recommended that actions resulting from the review be communicated to AFLC/JAB, entered into the computer, and made available for management use.

As a second example, similar difficulties in data retrieval existed at ASBCA, whose system did not provide information on the disposition of appeals by categories such as T for D or T for C. It is recommended that the data management capability of their system be increased. Such a change is a distinct possibility since the ASBCA is considering the adoption of a new data system (4).

In more general terms, it is recommended that improvements be made by the adoption of a Data Base Management System (DBMS), a system which stores, retrieves, and manipulates data (14:141). User needs or views should be incorporated into the DBMS when it is designed. Data such as contract type, reason for appeal, appeal disposition, business size and others could be retrievable by contract number, date, or military service. The data retrieved by a DBMS can be analyzed by using parametric and non-parametric

statistical procedures (6:36-39). One of these is "cross-tabs," a descriptive procedure which analyzes the relationship of variables and indicates the absolute and relative frequency for each variable (6:36-39).

It is recommended, therefore, that data collection for management use along lines described above be increased. Contracting areas such as disputes, appeals, and terminations seem to be suitable areas in which improved data management can lead to improvements in the sum total of contracting knowledge, in management procedures, and in the management of contract terminations for default and for convenience.

APPENDIX A

1966-1968 DEFAULT EXCUSE SCORE CARD

CONTRACTORS' CLAIMED EXCUSES	DECISIONS		
	TOTAL	YES (EXCUSE)	NO
DEFECTIVE SPECIFICATIONS	27	14	13
INSPECTION AND TESTING	37	18	19
FINANCIAL PROBLEMS	28	4	24
IMPOSSIBILITY	16	5	11
GOVERNMENT ACTS	28	17	11
SUBSTANTIAL PERFORMANCE	10	2	8
SUBCONTRACTOR FAULT	27	1	26
PREMATURE DEFAULT	22	7	15
DEFECTIVE "CURE" NOTICE	11	3	8
WAIVER OF DUE DATE	29	14	15
PREPRODUCTION SAMPLES	13	3	10
MISCELLANEOUS	64	10	54
TOTALS	312	98	214

Source: (11:412)

APPENDIX B

DATA SOURCES - RESEARCH QUESTIONS

Collection Stages	Research Question 1 Source	Sample	Research Question 2 Source	Sample
Stage One Summarized Data on all AF contracts General Information for comparison	AF/RDCX (26) ASBCA (1)	Summarized data on total contracting actions and dollar amount		
Stage Two All ASBCA cases summarized data for comparison Population from which to select cases	FLITE (10) Published ASBCA decisions	Census of all Air Force contracts appearing in ASBCA decisions All Air Force T for D converted to T for C	Published decisions (3)	All individual cases involving T for D converted to T for C
Stage Three Negotiated prior ASBCA data Summarized data for comparison Population from which to select cases	AFLC/LMV (25) AFLC/JAB (27) AFLC TCO Dockets	Summarized data Judgment Sample Total number of T for D and T for D converted T for C	AFLC TCO dockets Retired files from Wright-Patterson 2750/ABW and McClellan AFB	Convenience sample

APPENDIX C

ASBCA NO. 20939

ASBCA No. 20939, 78-1 BCA para. 12,870
Mid-American Engineering and Manufacturing

A termination for default following a first article test failure was improper because the performance criterion established was too indefinite.

The contract was for production of wiring harnesses composed of cables encapsulated in a molded polyurethane potting compound. The first article was rejected because too many air bubbles were present. The contract contained no standard for judging an acceptable level of air bubbles; by rejecting the first article the Government constructively changed the contract to add a requirement. The contractor requested a criterion for the number of air bubbles, but the Government supplied none, nor did they provide an example of an acceptable harness, even though one was available; they merely stated no or almost no air bubbles should be visible. Although descriptive literature describing the potting compound was incorporated in the contract, the only reference to air bubbles was that care should be taken to avoid them.

The contractor achieved a reduction in the number of bubbles before submitting another article for testing, but this was also rejected. The performance criterion established by the Government was too indefinite to enable the Government to terminate the contract for default.

APPENDIX D

ASBCA NO. 22083

ASBCA No. 22083, 78-1 BCA, para. 12,997
Hacking Labs

Default termination of a contract for microwave antennas for failure to make progress was improper because the Government waived a delivery date and did not allow the contractor a reasonable time to correct criticisms of submitted testing procedures.

A first article of each of three antennas was to be fabricated and tested according to submitted test procedures. After meeting with Government personnel, the contractor submitted revised procedures with the understanding that long range testing was the major disagreement. Some time later the Government gave unspecific notification of criticisms and set a date for the test procedures. Two days before the date the contractor learned the substance of the criticism which was contrary to his previous understanding. Because of labor illness the contractor could not complete the test procedures on time and the contract was terminated.

The Board determined that it was unreasonable for the contracting officer to withhold information regarding criticism of the test procedure and expect submission of acceptable procedures within two days. Having waived the due date, the Government had a duty to set a new and reasonable time.

APPENDIX E

ASBCA NOS. 22233, 22234

ASBCA Nos. 22233, 22234, 78-1 BCA para. 13,157
American Trans-Coil Corporation

Default termination of two contracts to furnish mixer modulators and amplifiers was improper, even though the contractor failed to meet the delivery date for the first articles under both contracts, because the Government allowed the delinquent contractor to pursue performance past the contractual due date.

The Government waited nearly a month after the contractor failed to meet the delivery schedule for the test articles before it issued a show cause and stop work order. During this period, the contractor continued work on both contracts. The delinquent first articles were furnished to the Government's Quality Assurance Representative (QAR) in the plant one day prior to receipt of the show cause letter. The QAR processed the items, sent them on to the destination; there they were rejected and the contracts terminated.

Although the contractor cited deficiencies in Government data and unusually severe winter weather, the Board's decision to uphold the contractor's appeal was based on Government inaction allowing performance to continue. Presence of the QAR in the plant charged the Government with knowledge of the performance. Right to terminate for default was waived.

APPENDIX F

ASBCA NO. 21967

ASBCA No. 21967, 78-2 BCA para. 13,481
Ovidio Flores, Sr., Plastics Contractor

This supply contract for aircraft safety harness was terminated for default on grounds of failure to make progress and abandonment. Government delays in formal approval of requested deviations from specifications, a prohibition against remedial stitching of discovered defects, and unreasonable evaluation of test results as requiring rejection of the harnesses were Government acts which excused the default. The contract administrator failed to approve requested deviations from the specifications for approximately four months although he apparently knew production had begun, and when goods were presented for inspection they were rejected for stitching defects which the Government incorrectly maintained could not be remedied under the contract. Also, tests were more stringent than required by the contract.

The delivery schedule was waived by the Government's failure to enforce the schedule or set a new one. Termination for failure to make progress could not be upheld because the required cure notice was not sent. There was no abandonment or anticipatory repudiation because Government acts had depleted the contractor's resources and prevented his further performance.

APPENDIX G

ASBCA NOS. 2110, 21556, 21979, 22293

ASBCA Nos. 2110, 21556, 21979, 22293, 79-1 BCA para. 13,878
Walsky Construction Company

This contract called for resurfacing eight tennis courts, some of which were badly cracked. Initially the contractor had the obligation to determine the proper mix of aggregate and binder, although he misunderstood the specifications, which were written by a Civil Engineer without experience in this particular work. The contractor was entitled to an extension because of Government indecision in first promising to supply information, then agreeing to consider an alternate proposal, then suggesting the use of proprietary methods not included in the contract. The contractor reasonably withheld performance expecting a change in specifications from the Government, finally stating he could not proceed according to the contract without specific direction.

The Government finally specified a procedure. When the process did not work, the contract was terminated for default on the grounds of failure to make progress. Although the contracting officer claimed the specifications were not defective, the Board found the original specifications not a sufficient basis on which to perform. When the Government specified a resurfacing mix, it also assumed the risk of failure, so the default termination was converted to one for the convenience of the Government.

APPENDIX H

ASBCA NO. 24419

ASBCA No. 24419, 80-2 BCA para. 14670
Michigan Hardware Company

The Government improperly terminated a contract for throttle control assemblies based on failure to deliver on time because the contractor's delay in completing performance was excusable. After timely ordering of specified ball bearings from the only active source, and after 85% of the work was complete, a strike stopped production of the bearings. The Government inquired whether a no-cost settlement could be effected, as an error in ordering had been made. The contractor declined and offered to use Government furnished bearings or to secure others at an increased price. The Government later inquired about a no-cost settlement again, then terminated for breach of contract shortly after the strike was settled.

This acquisition was a unilateral purchase order, but performance by the company constituted acceptance. The Board declared it a valid contract, and decided the appeal on the basis of whether or not the strike which delayed the ball bearings constituted excusable delay. The Board found the strike without the fault of the contractor and outside of his control, and since the Government did not accept the alternate procedure proposed by the contractor for completion the delay was excusable.

APPENDIX I

ASBCA NO. 24766

ASBCA No. 24766, 80-2 BCA para. 14,815
Frank Martinez, Jr., dba Martinez Bros.

This construction contract required the conversion of a firing range to a sensitive compartmented information facility. Removal of acoustical material that had been imbedded in cement was impossible from a practical standpoint, and the default termination was found to be improper.

Site inspection did not reveal the type of bond, the Government was unaware of it, and the contract was silent on the matter. What appeared to be panels attached to the walls turned out to be panels inside the forms when the concrete was poured, and so permeated with concrete and impossible to remove. Contract inspectors observed the contractor attempting for two months to remove the material; finally the Government accepted covering the material with drywall.

Other elements in the contract were disputed, namely requirements for an air handling unit, for specially hardened steel bars, alleged Government delay in approving floor tile, and compensation for a contract change. These factors contributed to delay of the construction, but the Board's decision was based on the impossibility of performance of removing the acoustical material. The termination was converted to one for the convenience of the Government, with appropriate settlement of the subsidiary problems.

APPENDIX J

ASBCA CONVERTED CASES

ASBCA Basis for Conversion

Contracting Officer's Basis for Termination	Unacceptable First Article	Failure to Make Progress	Failure to Complete on Schedule	Failure to Make Progress, Abandonment	Failure to Meet Delivery Schedule	First Article Not on Time
Ambiguous Specifications	C					
Defective Specifications		G				
Waiver of Due Date		D				
Excusable Delay Due to Impossibility of Performance			I			
Waiver of Delivery Date; Government Acts Delayed Contractor				F		
Premature Termination, Excusable Delay					H	
Waiver of Delivery Date; Performance Past Date						E

Legend:

Symbols in the matrix indicate the Appendix in which the case is summarized.

APPENDIX K

CASE NO. 1

Terminations for Default converted without ASBCA Decision: Case No. 1

This service contract for laboratory maintenance was terminated for default after three weeks of attempts to perform the needed services, then converted to a termination for convenience by negotiation at the contracting officer level. Three disputes involving three contracts were resolved by the Supplemental Agreement effected in February 1978.

The contractor awarded this contract underbid the one that had held the contract during the previous fiscal year, apparently assuming that he could hire the incumbent's personnel when the work changed hands. The incumbent retained his personnel for other work, and the new contractor was unable to secure competent workers. After three weeks the contract was terminated for default. Meanwhile, the incumbent had protested the award and was subsequently given the reprocurement contract.

The Case No. 1 contractor had disputes and appeals on two other contracts; all three were resolved with a Supplemental Agreement converting the default termination to one for convenience and making negotiated settlements of the disputed matters.

APPENDIX L

CASE NO. 2

Terminations for Default converted without ASBCA decision: Case No. 2

This supply contract for signal conditioning amplifiers was awarded to the lowest of several bidders, although the contractor's ability to solve design problems and to produce at the low bid price was questioned. After organizational and technical problems were encountered, and the due date was near, the contractor requested design help that had been offered by the using agency. Design help was offered, but without warranting the design; this assistance near the delivery date waived the Government's right to the due date, so the contract was extended. After the delivery date passed with no performance, the termination for default was initiated. Unexplained nondelivery of a stop-work order allowed performance to continue. Considering that default termination and the assessment of reprocurement costs might bankrupt the small business contractor and interrupt performance on other defense contracts, a no-cost termination for convenience was effected.

Reprocurement and delivery was accomplished only after design changes were made.

APPENDIX M

CASE NOS. 3 AND 7

Terminations for Default converted without ASBCA decision:

Case No. 3

This case, like case No. 7 below, was a supply contract terminated for default, but then reinstated by Supplemental Agreement when shipment of the supplies was made before complete execution of the termination.

A number of parts kits were to have been delivered. When they were not delivered by the due date, and since demand for the items was very low, the contract was terminated for default by sending a telegram. There was a documented failure by Western Union to deliver the message in a timely manner. In the 18 days it took for the message to arrive, the contractor shipped the kits, which were accepted at the destination. The contract was reinstated and the schedule adjusted for a reduction in the contract price.

Case No. 7

This unilateral purchase order for 21 'reactors' was cancelled at no cost because the vendor stated he had financial problems and could find no source of supply. By the time the cancellation documents were sent from the ACO to the PCO and then to the TCO, the vendor had secured the items, shipped them to the destination, and they had been accepted. The purchase order was then reinstated.

APPENDIX N

CASE NO. 4

AD-A103 258 AIR FORCE INST OF TECH WRIGHT-PATTERSON AFB OH SCHOOL--ETC F/G 5/1
CONTRACT TERMINATIONS FOR DEFAULT AND CONVENIENCE.(U)
JUN 81 A D ROCHE, T L SCHEIDT
UNCLASSIFIED AFIT-LSSR-46-81 NL

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Terminations for Default converted without ASBCA decision: Case No. 4

This contract was for the delivery of a rectifier system for a plating shop at a price of $194,366. After the delivery date passed without performance, the contract was terminated for default.

Controversy developed during the contract period over types of materials and placement of controls. The contractor claimed the specifications were ambiguous. After the delivery date a meeting was held at the contractor's plant, at which Government personnel allegedly admitted that the specifications were ambiguous, and at which a termination for default was not discussed. The contractor assumed agreement that the Government would make a change, expressed surprise when the termination for default was executed, and appealed to the ASBCA.

A trial attorney, aware that the Government might have waived its right to insist on the delivery date, was instrumental in securing a negotiated settlement. The termination for default was converted to one for convenience, and the contractor paid the Government an amount for damages in lieu of reprocurement costs.

APPENDIX O

CASE NO. 5

Terminations for Default converted without ASBCA decision: Case No. 5

This supply contract was for delivery of a 20-channel voice recorder/reproducer at a price of $1,251,973. The contract contained a first article submission and approval of testing requirements. When the first article was not submitted on time and the Government considered that the reliability testing program was jeopardizing the whole program, the contract was terminated for default. The contractor appealed to the ASBCA on the grounds that the Government had encouraged performance after some deadlines had passed, had supplied defective equipment, and delayed required approvals.

When solicitation for reprocurement had been made, the contractor petitioned for reinstatement. A Supplemental Agreement extended the delivery date, incorporated some design changes, and restored the contract. The contracting officer's statement evaluated the contractor's solution to previous problems as innovative and effective from an engineering standpoint, and considered the reinstatement in the best interests of the Government, since it was a substantially quicker way to acquire the material than a new procurement.

APPENDIX P

CASE NO. 6

Terminations for Default converted without ASBCA decision: Case No. 6

This contract was for supplying aircraft fuselage sections from vendors of surplus material. When the vendor could find no source of supply after repeated efforts, he sought a termination for convenience. Instead the contract was terminated for default. When the possibility of reprocurement and assessment of excess costs was brought to the contractor's attention, he alleged that he had relied on advice from the ACO, who had assured him that the termination would be for convenience. He had now discovered a vendor, however, and requested reinstatement of the contract for a small reduction in the price as consideration for extending the delivery date. As the items were still needed and reinstatement would be the quickest way to acquire the material, the contract was reinstated as being in the best interest of the Government.

APPENDIX Q

NEGOTIATED SETTLEMENTS

Reason for Conversion to Convenience or other Disposition

Contracting Officer's Basis for Termination	Inadequate Performance lack of personnel	Failure to Perform	Failure to Deliver	Delinquent First Article	Inability to Secure Material
Other Government benefits	K1				
Waiver of Delivery Date		L2	N4		
Contractor Performance Before T for D			M3		M7
Reinstatement Quicker than Reprocurement				05	P6

Legend:

Symbols in the matrix indicate both the number of the case and the letter of the Appendix in which it is described

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